EXHIBIT E

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

In re	Case No.: HC 5337
Frank McCormick (C-78307)	ORDER
On Habeas Corpus.	

Petitioner contends that the Board of Prison Terms deprived him of a federally protected liberty interest by refusing to find him suitable for parole at his November 14, 2005 parole suitability hearing. Specifically, Petitioner alleges that the Board improperly based its unsuitability finding on Petitioner's commitment offense, and certain unchanging facts of the crime. He believes the denial was not based on reliable evidence, and that it was egregious for the Board to recommend what course of conduct Petitioner should follow in order to be found suitable for parole in that Petitioner was already performing those recommended actions.

A parole board's decision to deny parole is subject to judicial deference and may only be reversed where it is not supported by "some evidence." *In re Rosenkrantz* (2002) 29 Cal.4th 616, 652. The Board's findings need only be supported by "a modicum of evidence," and the Board is granted discretion to weigh the evidence and resolve any conflicts therein. *In re Cortinas* (2004) 120 Cal.App.4th 1153, 1166. The Board may properly find an inmate unsuitable for parole based on the circumstances of the offense if the violence or nature of the crime is "more than the minimum necessary to convict him of the offense for which he is confined. *In re Dannenberg* (2005) 34 Cal.4th 1061, 1095. So long as there is "some evidence" in support of the Board's findings, a court must uphold the decision. *In re Cortinas, supra,* 120 Cal.App.4th at 1166.

The Court has reviewed the hearing transcripts appended to the petition, and all documentary support. It appears that, contrary to Petitioner's assertions, the Board's decision to deny parole for a period of one year was supported by "some evidence." The Board considered evidence that Petitioner shot the victim at close range while the victim was seated in a parked car with a dead battery. At the same time, Petitioner's friend was engaged in a heated discussion with his boss, with whom he had earlier been arguing, who was seated in the parked car with the victim. Petitioner apparently believed his friend's boss was going to pull a gun on them, so Petitioner fired a fatal shot in his direction. Petitioner did not render any assistance to his victim. Instead, he and his friend fled the scene and parked out of view behind Petitioner's residence.

The Board found that the shooting was carried out in an especially cruel and callous manner, and that the motive for the crime was very trivial in relationship to the offense in that it was committed as a result of an argument that didn't involve the petitioner. Moreover, the crime created the potential for additional victims, including the occupant sitting in the driver's seat.

The Board further based its decision on the fact that Petitioner had accumulated seven RVR-115 rules violation reports over a span of years. The Board noted that it had been six years since Petitioner had received an RVR-115, but wanted to see at least one additional year of good behavior before making a finding that Petitioner would be able to follow the rules of society on parole. The Board expressed its desire to explore the extent to which Petitioner had come to terms with the commitment offense, and to review at least one additional psychological evaluation before recommending parole. Indeed, the two psychological reports in Petitioner's file did not state that he no longer posed a threat of danger to the community, but only that his risk was not higher than average. The Board additionally indicated that it would ask the psychologist to determine the significance of alcohol with respect to Petitioner's

potential for violence, as that issue had apparently not been adequately considered by the staff psychologist.

On review of the evidence before the Court, it appears that the Board's decision was based in large part on its determination that Petitioner had not remained disciplinary free for a sufficient length of time during his period of incarceration. The Presiding Commissioner's closing remarks to Petitioner were as follows:

> "Please do not get any more 115s or 128s. That's what's going to set you back, and I'm sure you are aware of that. Those 115s set you back because the thought is that if you can't follow the rules within the institution, that you're not going to follow them in the community. Absolutely do not receive any more 115s, and if there [are] any self-help or therapy programs available in the institutions, take advantage of theme, and complete them as well. Okay."

Transcript of Decision, pg. 7, 11/14/05.

Petitioner may take umbrage with being reminded to remain discipline free and participate in institutional programs, but his Court disagrees that the Board's suggestions were "egregious" in nature, as Petitioner suggests. Moreover, the decision was not solely based upon the nature of the commitment offense, or unchanging factors, but was based upon the Board's determination that more evidence was needed with respect to the following matters: Petitioner's willingness and ability to accept responsibility for his crime, to participate in self-help or therapy programs, and to remain disciplinary free. Additionally, the Board found it necessary to review a psychiatric report based, in part, on matters not then available for the Board's consideration.

Based upon the foregoing, there is "some evidence" in the record supporting the Board's decision, and the decision must be upheld by this Court. Accordingly, the petition is DENIED.

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IT IS SO ORDERED.

Dated: 10/6/06

Hon. Marla O. Anderson
Judge of the Superior Court

CERTIFICATE OF MAILING

C.C.P. SEC. 1013a

I do hereby certify that I am not a party to the within stated cause and that on October 10, 2007 I deposited true and correct copies of the following document: ORDER in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses as hereinafter set forth:

Frank McCormick (C-78307)
CTF, East Dorm, 148L
P.O. Box 689
Soledad, CA 93960-0689

Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
Attn: Correctional Law Section

Pam Ham, DDA
Office of the District Attorney
240 Church St., Rm. 101
Salinas, CA 93901
Via interoffice mail

Dated: October 10, 2007

LISA M. GALDOS,
Clerk of the Court

By: _____
Deputy

Mc Cormick, Frank

Name Frank McCormick

Address Correctional Training Facility

P.O. Box 689 / East Dorm 148-Low

Soledad, CA.93960-0689

CDC or ID Number C-78307

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

(Court)

FRANK McCORMICK

Petitioner

vs.

A.P.Kane, Warden(A)

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS — READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(h)(1) of the California Rules of Court [as amended effective January 1, 1999]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)*

DUE PROCESS VIOLATION BY THE BOARD OF PRISON TERMS

(see attached Writ of Habeas Corpus)

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

(see attached Writ of Habeas Corpus)

b. Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(see attached Writ of Habeas Corpus)

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STATEMENT OF FACTS

COMMITMENT OFFENSE. In the early morning hours of August 10, 1983, police officers arrested Alfred Emanuel "Bubba" Johnson, Jr. and Frank McCormick as suspects in the shooting death of an individual named Stephen Edwards in the parking lot of the Seasider Club a few hours earlier. According to witnesses, Edwards had been sitting in a vehicle with two friends in front of the Seasider Club when Johnson and McCormick pulled into the parking lot. Johnson then approached the passenger side of the car occupied by Edwards while McCormick approached the drivers side. Words were exchanged between Edwards and Johnson and at some point, McCormick pulled out a handgun which he pointed at Alvin Brooks, Edward's companion. The discussion between Edwards and Johnson grew heated until, according to witnesses, a shot rang out and Edwards was struck with a bullet from the gun of Frank McCormick. The suspects then fled the area in a car that was traced to McCormick's residence in Fort Ord. The suspect vehicle, it was later noted by arresting officers, had been parked behind the residence in a manner which concealed it from the street.

Additional witness interviews were conducted at the scene of the crime and one individual, who wished to remain anonymous, advised that after hearing the shot ring out, he observed two Negro males approach an apartment complex from the Seasider and place something under a white Cadillac which was parked at the complex. The caller felt that this might possibly have been a firearm, however, a search of the area by police officers a short time later revealed nothing.

A statement was also taken from Alvin Brooks, driver of the vehicle in which Stephen Edwards was sitting at the time he was shot. Brooks indicated that he, Edwards, and another individual had been

drinking some whisky while parked in the Seasider parking lot when Bubba Johnson had driven by in a 280Z. Johnson then proceeded to drive around the block, and, on the third time around, got out of the car. He called out to Edwards, "Get out and come over here and talk." Edwards refused, however, and indicated that he did not wish to be involved withJohnson. Johnson then approached the car and took a swing at Edwards, as Frank McCormick simultaneously came to the driver's side. Upon reaching the door, McCormick produced a handgun and pointed it at Brooks' temple. Brooks attempted to start his car but the battery was dead. McCormick then stated, "Go for it," indicating that Brooks had a gun. Brooks told McCormick that he had no gun, and at this time he was ordered to remove the keys from the car. As he was doing so, Brooks observed McCormick move the gun and fire one shot. He heard Edwards yell and realized that Edwards had been hit. Just before the shooting, Johnson had been arguing with Edwards about Edwaards carrying a knife. After the shot, McCormick and Johnson left the area immediately.

Regarding the cause of the dispute between Bubba Johnson and Stephen Edwards, several witnesses indicated that approximately tow days before, the two had exchanged words at the Seasider Club. Among other things, Edwards had called Johnson a "rapist", an appellation which particularly perturbed Johnson as he had served time in prison on rape charges. A fight ensued, the police were called, and Bubba Johnson was maced and taken to the Seaside Police Station. No charges were filed, however.

At approximately 6:30am, on August 10th, Frank McCormick volunteered a statement regarding his involvement in the listed offense. He related that Johnson and himself had been at the Seasider

around 3:00 or 4:00pm the previous afternoon, but had not gone back later that evening. When confronted with the fact that several witnesses had seen Johnson and himself in the parking lot later that evening, McCormick said that he was heavily intoxicated and couldn't say for sure that the two hadn't stopped by. In a later interview, in fact, McCormick admitted that the two had approached Stephen Edwards in the Seasider parking lot later that evening. McCormick added that at the time of the shooting, Edwards was reaching under the seat for what he and Johnson thought was a gun. McCormick stated Johnson had intended to straighten things out with Edwards after what happened the other night. Edwards, however, had pulled a knife which Johnson had taken away from him. It was then that Edwards began reaching under his seat. According to McCormick, the victim stated, "I'll kill both you motherfuckers." McCormick then fired a shot, in what he claimed was an attempt to hit the seat. He wasn't sure that he'd hit Edwards at this time. McCormick then proceeded home with the murder weapon still in his possession. It was later recovered by police during the search of his residence.

SOCIAL HISTORY. Petitioner now 54 years old, entered prison at the age of 32. Petitioner was sentenced to a term of 15 Years to Life, plus 2 years for a gun enhancement. He was received by the Department of Corrections on December 22, 1983. The Department of Corrections determined petitioner's Minimum Eligible Parole Date (MEPD), to be May 14, 1993. (see Exhibit "F"). Petitioner's Initial Considering hearing was April 28, 1992. Petitioner has since had subsequent parole consideration hearings on March 23, 1994, March 29, 1995, June 24, 1996, June 18, 1997, July 7, 1998, December 13, 1999, May 15,

2000, October 31, 2001, September 25, 2002, November 3, 2003, April 6, 2004, and November 14, 2005. At each and every hearing petitioner was found unsuitable for parole. The Board of Prison Terms cited as reasons for unsuitability the unchanging factors of the commitment offense and factors unsupported by statute or regulation, making ad hoc rationalizations in search of justification. Finally, the Board of Prison Terms denies parole to petitioner by re-characterizing the commitment offense in terms of a First Degree Murder, such as "especially cruel and callous," "multiple victims," trivial and inexplicable. This violates petitioner's Second Degree Murder conviction when, as is the case here, the BPT extends the punishment of petitioner beyond the uniform terms of punishment indicated by CCR 15, §2403(c). It is the November 14, 2005 decision by the BPT to deny parole that is the foundation of stated claims herein. (see Exhibit "C").

ADVANCES DURING INCARCERATION. Petitioner admits his responsibility for the commitment offense and his continually expressed remorse for his actions and it's impact on the victims. (see Exhibit "D", BPT Psych. Evaluation).

Petitioner has remained disciplinary free for 7 years, has repeatedly participated in rehabilitation programming during his 23 years of incarceration. He has achieved, earned or received: High School Diploma, 1.5 years of College, Forklift Driver, Personal Reliability Program (PRP), Teacher's Aide, Small Engines, 2-Stroke and 4-Stroke Engines, Boat engines, Inboard and Outboard, Jet Boat Engines and Drives, Motorcycles, Dry Cleaning, Processessing Orders, Material Identification, Sorting, Spotting, Machine Operation, Dry

Cleaners, Washer, Dryer, Pressing, Steaming, was M.A.C. Chairman, and participated in the following fund-raisers, Friends Outside, Children's Christmas Festival, Seaside Boy's and Girl's Club, Salinas Boy's and Girl's Club, Battered Woman's Shelter, Monterey County, Coats for the Needy, Monterey County, and participated in a F.E.M.A. program receiving Certificates in Emergency Preparedness, Animals in disaster, Awareness and Preparedness, Animals in Disaster, Community Planning, Leadership and Influence and Effective Communication.

Petitioner has several highly supportive psych report evaluations finding in pertinent part (see Exhibit "D"), "If released to the community, his violence potential is estimated to be "no higher than the average citizen in the community." McCormick has viable parole plans, support from family and friends, and has marketable skills. (see Exhibit"E"). Petitioner's only criminal background consists of a single misdemeanor conviction for disturbing the peace, an act that does not include behavior necessary to support a parole denial. Ignoring these facts, demonstrating he has rehabilitated himself, the Board arbitrarily found petitioner unsuitable for parole, denying him for 1 year based on the gravity of his commitment offense.

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GROUND ONE.

THE BOARD FINDING OF UNSUITABILITY AND REFUSAL OF THE GRANTING OF PAROLE VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS AND DEPRIVED HIM OF HIS FEDERALLY PROTECTED LIBERTY INTEREST WHEN THE BOARD DENIED PETITIONER A PAROLE GRANT WITHOUT ANY RELIABLE EVIDENCE OR "SOME EVIDENCE," IN VIOLATION OF THE 5TH AND 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 3041 of the California Penal Code creates substantial presumption that a parole release date shall be set at the initial parole hearings, and, in a manner that is uniform to other similar offenses. Subdivision (a), and, Subdivision (b), of Section 3041 mandates that a parole release date "shall" be set "unless" the Board (BPT) finds that the gravity of the commitment offense or offenses, or, the timing and gravity of past convicted offenses are such that a consideration of the public safety warrant not setting a release date at that hearing. There is no other criteria in the statute for denying parole to a prisoner. It appears from the language that "consideration of the public safety" is nonetheless limited to the gravity of the offense and/or the timing and gravity of any past "convicted" offense or offenses. The statute does not encompass or authorize some of the criteria set forth by the Cal. Code of Regulations, Title 15, Section 2402. It does appear that the statute has been enlarged to include additional criteria not expressly authorized by the statute.

Notwithstanding, the argument set forth in the petition is not merely an argument about a state law violation. The presumption vested by the statue is substantial, while the statutory criteria the Board must meet in order to deny parole is limited to criminal conduct at the time of the offense. For the Board to interpret the

statute in such a manner as to deny parole solely the commitment offense after the Board has denied petitioner on the exact same point (13) times, deprives petitioner of a substantial liberty interest protected by Federal Due Process. (see Biggs, at 334 F.3d 917). The effect of such an interpretation, established by practice,is to subject all prisoners to proforma decisions, where the Board goes through the motion of due process review, citing post hoc rationalizations to justify the parole denial, that is now always the result. This is little different than a decision to deny parole made without any evidence to support it. Thus, by misinterpretation, whether inadvertently or intentionally, the result is not merely a violation because it is an action the Board is simply not authorized to take by the enabling statue that impinges on Federally protected liberty interests. Petitioner relies on this claim which is now brought before the State Court.

A. THE BOARD DID NOT MEET THE BURDEN OF PROOF THAT PETITIONER POSES AN "UNREASONABLE RISK" OF THREAT TO PUBLIC SAFETY IF RELEASED ON PAROLE. THE DECISION WAS WITHOUT EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS VIOLATING FUNDAMENTAL DUE PROCESS.

The regulatory law requires the Board to set a release date unless if finds that the prisoner poses an "unreasonable risk" to public safety if released at that time, 15 CCR, 2402. This is consistent with the enabling statue, which requires the setting of a release date.

If the preponderate record before the Board demonstrates that petitioner does not pose the "unreasonable risk" (which the record show that he does not, from petitioner's last (13) parole hearings), a release date must be set.

If the Board denies petitioner parole without making this

requisite finding based on relevant and credible facts in the record, then this is not merely a state law violation, but, a deprivation of the substantial liberty interest he has in obtaining a release date. Failure of the Board to act in accord with the regulations, in such situations, constitutes a substantive due process violation because it constitutes an abuse of discretion that unfairly and inaccurately deprives the prisoner of his right to that Federally protected liberty interest. The Board needs more than "some evidence" to arrive at their decision, even though once the decision is made, the reviewing court needs only to find "some evidence" to support the decision or findings that were made. As petitioner will point out, the "some evidence" standard is not a "burden of proof" - although the Board or Prison Terms and the Governor seems to think it is. Petitioner will demonstrate by clear and convincing facts that the Board's burden of proof is the "preponderance of evidence" standard, but, they totally ignore this in arriving at their post hoc rationalization to deny parole in nearly every case. There must be a weighing and balancing process according to a burden of proof.

Thus, petitioner alleges that the Board's decision in his case exceeded the bounds of "review" and was made without the procedural safeguards required by the Constitution, and, without applying the proper proof necessary to overcome the presumptive right to release delineated in Penal Code, Sectionn 3041.

Statutory law in California applies the "rock bottom" burden of proof in judicatory proceedings as the "preponderance of evidence" level. (Evidence code, Section 115). The Board of Prison Terms list under "Good Cause," The preponderance evidence (15 CCR, Division 2, Section 2000(b)(49), and, also lists "relevant" and "material"

evidence as the standard for being valid "evidence." (15 CCR. Div. 2, Section 1000(b)(62)(material evidence), and, (90)(relevant evidence). The "good cause" provision is a requirement for decision making that applies to all substantive decisions. These regulatory and statutory provisions initiate the weigh and balancing process of evidence at parole hearings. A responsibility the Board must undertake. The Board cannot apply the "some evidence" standard because is is not a burden of proof. (In re Ramirez, (2001) 94 Cal.App. 4th, 549 at 564-565; Edwards v. Balisok, (1997) 520 U.S. 641, at 648). The "some evidence" applies only to questions of evidentiary sufficiency as an "additional requirement of due process, not substituted for other due process requirements."(Ibid.). The "some evidence" standard is applied only by the reviewing court to determine if the Board's (Governor's) decision is supported by "some evidence," if the court finds the Board complied with all other requisite due process requirements. If the Board failed to apply a critical element in the weighing and balancing of evidence, such as a burden of proof, then the court cannot deny the petition because there isn't "some evidence" in the record to support the decision. As the Appellate Court in In re Caswell, 92 Call.App. 4th, 1017, 1029, pointed out, there is always some evidence in the record of unsuitability of parole, which, if invoked, would subject every consideration of parole to an arbitrary standard or political whim, but, for a burden of proof, and the burden of producing evidence, is clearly in California law, e.g., People v. Dubon, 90 Cal. App. 4th, 949, 952 (2001), and, applies to all state agencies.

Here, where the statute presumes that a parole date "shall normally" be set; the Board must, in their weighing and balancing of

all relevant, material, and, reliable evidence, present by a preponderance of that evidence, a "rational connection" between the basic facts the Board is asserting as sufficient to deny parole, and, the ultimate fact statutorily presumed, i.e., that the prisoner is more than likely not "suitable" for setting a parole release date.

Petitioner submits that the Board and the Governor have broad discretion in parole matter, but, the requirement of procedural due process embodied in the California Constitution ... places some limitations upon these discretionary powers.

As heretofore shown, the Board's burden of proof is the preponderance of relevant and material evidence standard. This is the "rock bottom" standard allowed by California law. (Evidence Code, Section 115; see e.g., Charlton v. Federal Trade Comm., 543 F.2d, 903-907, 908 (D.C. Cir. 1976)(Speaking to this standard being "rock bottom" burden of proof). "Good Cause" is defined in the BPT's regulations as "a finding by the Board based upon a preponderance of the (material and relevant) evidence that there is a factual basis and good reason for the decison made. (Ibid. 2000). Here, in petitioner's case, the Board, based on the "material and relevant" evidence, found petitioner unsuitable for parole solely on the basis of the commitment offense which petitioner has been denied (13) times based primarily on the same issue, i.e., unchanging factors, (commitment offense). This is a clear due process violation and especially where the relevant and reliable evidence concerning public safety, i.e., petitioner's psych report that was presented at petitioner's (12) subsequent parole consideration hearing (in relevant part), "If released to the Community, his violence potential would be considered to be somewhat below average relative to the

average citizen in the community," shows that petitioner does not pose an "unreasonable risk" to the public if released at this time.

The mandatory language in Section 3041 of the Penal Code, established a rebuttable presumption affecting the Board's burden of producing evidence and the burden of proof implementing public policy regarding the parole of term to "life" prisoners.

Petitioner asserts that the ultimate facts sought is a determination whether the prisoner is currently an "unreasonable risk" of danger to the public safety if released on parole. (Subd. (b), 3041, Penal Code; 15 CCR., Section 2402(a)).

The presumption created by mandatory language in both subdivision (a) and (b) of Section 3041 is that petitioner "shall normally" have a parole release date set "unless" the presemption is overcome by the Board which carries the burden of proof as to the existence of the presumed fact. McQuillion v. Duncan, 306, F.3d., 901-902 (9th Cir. 2002); Biggs v. Terhune, 334 F.3d., 910, 916-917 (9th Cir. 2003)(regarding the presumption in Penal Code, Section 3041). If the Board cannot produce the evidence according to the burden of proof required, then the presumption stands, and, the court is obliged to uphold the presumption, and, under In re Smith, 109 Cal.App. 4th, 489 (2003), must order petitioner released from custody.

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GROUND 2 :

THE BOARD VIOLATES DUE PROCESS BY REPEATEDLY RELYING ON THE UNCHANGING FACTS OF THE CRIME IN THE FACE OF CLEAR EVIDENCE OF REHABILITATION, & BY MAKING RECOMMENDATIONS OF WHAT TO DO TO BE FOUND SUITABLE AT EACH HEARING. A FINDING OF EGREGIOUSNESS IS BARRED BY THE INMATE'S COMPLIANCE WITH THOSE AGREED TERMS.

When the Board repeatedly relies on the unchanging facts of the crime to deny parole, in the face of clear evidence that the inmate has been rehabilitated, due process is violated. (Biggs, supra, at 915-916, Ramirez, supra, at 571). However, here, the Board goes a step further. At the conclusion of each hearing attended by petitioner, the Board gave him a series of recommendations of what to do in order to be found suitable for parole. If the crime was going to continue to be an impediment to parole, then what difference would it make whether petitioner followed those recommendations, since parole would be denied in any event as the crime will never change? How could the Board make those recommendations in good faith if the crime was such that parole was not going to occur no matter how well petitioner programs? Even worse, if he complies with those recommendations and the Board gives him a parole date, if the Governor is permitted to effectively negate this whole process unilaterally taking that parole date away, then the recommendations and compliance are rendered useless acts.

The Board has a duty to make all recommendations "sufficiently clear" to inform petitioner what conduct will result in a grant of parole. (U.S. v. Guagliardo, 275 F.3d 868-872, (9th Cir. 2002)[citing Graynet v. City of Rockford, 408 U.S. 104, 108-109, (1972)]).[1] Thus,

[1]A prisoner's due process rights are violated if parole conditions are not made "sufficiently clear" so as to inform him of what conduct will result in his being returned to prison. Likewise, the Board of Prison Terms has a duty to make

the onus is on the board to clearly and specifically state what conduct will warrant a finding suitability. Therefore, it follows that there is only one way to interpret the recommendations given to petitioner at the Documentation Hearings ad at each of the Subsequent parole hearings. They constitute the Board's "clear instructions" as to what petitioner must do to be found suitable. As stated, it is indisputable but that petitioner has complied with every single one of the Board's directives to him, and, thus, the Board must finally find petitioner suitable for release. If the Boards' directions to the inmate are not acknowledged as sincere offers providing legitimate goals for achieving a status of parole suitability, then they are mere "hoops," designed to support elaborate rouse and a further affront to the due process rights of all prisoners who rely upon them.

As noted, petitioner sincerely relied upon the recommendation of the prior Board panels, and, he partook to fulfill each one. Petitioner's fulfillment may be recognized through his educational and vocational accomplishments and gains, his ongoing self-help work, and his crime free behavior throughout his nearly (23) years of incarceration. Petitioner has complied with those directives following each and every hearing, and the Board should finally recognize his compliance by granting parole.

A. CONTINUED RELIANCE ON THE UNCHANGING FACTS OF THE CRIME VIOLATES DUE PROCESS.

In Biggs v. Terhune, the 9th Circuit held that even if the commitment offense(s) are sufficient to support a denial of parole,

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recommendations for parole eligibility "sufficiently clear" so as to inform the inmate of conduct that will wrrant a finding of suitability. (see U.S. v. Guagliardo, supra, 278 F.3d 868).

the crime alone will not justify repeated denials of parole based upon considerations of due process. Biggs v. Terhune, supra, 334 F.3d at 916. The Ramirez, court also acknowledged that there will always be "some evidence" to support a finding that a prisoner committed the underlying offense. Those facts alone, however, do not justify the denial of parole. Thus, while concluding that there was factual support for the findings as to the crime and priors, the Ramirez court still found the Board's decision arbitrary since there had been (7) hearings at that point, (9) years had passed beyond the minimum term, and, it was 17 years after entering prison, and, all evidence showed rehabilitation. (Id. at 571). Likewise, as the Biggs court more recently said, despite the fact that there may remain evidence to support a finding of egregiousness of the crime:

> "A continued reliance in the future on an unchanging factor, the circumstances of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." (Biggs, supra, at 916-917).

In the recently published case of Irons v. Warden, 358 F.Supp. 2d, 936 (E.D. Cal. 2005), the Federal court has applied the dictates of Biggs. In Irons, the court found that the Board violated the prisoner's due process by continuing to rely on the immutable factors. (e.g., the commitment offense and history prior to incarceration) to support the denial of parole. In doing so, the Federal judge there ruled that continuing to rely on those factors that can never change, such as the commitment offense, where there is no proof of continuing bad conduct to support a finding of current threat to the public, offends due process.

In interpreting the rule put forth in Biggs, and, the plain language of Penal Code §3041, it is clear that even if the crime may

be considered egregious, under federal due process principles, the denial of parole based on the immutable facts of the crime is only authorized at the first parole consideration hearing. The provisions of Penal Code §3041, only talk of the use of the crime to defer setting of a date at theinitial hearing. (Penal Code §3041(a)). After that, to give the statute a constitutional interpretation that is not unreasonably vague, further denials would have to be based on some facts arising subsequent to the crime that show a continued propensity for violence, making the inmate a danger to the public. (Biggs v. Terhune, supra, 334 F.3d at 914-915). To rule otherwise would put petitioner in an impossible situation, where no matter what he shows in terms of positive behavior, reformation, self-help, work skills, parole plans, or just rehabilitation in general, he would never be able to overcome the unchanging facts of the crime. The only logical application of Constitutional Due Process dictates what the court in Irons held, i.e., that any subsequent denial requires the presence of some in-prison behavior showing that the inmate currently presents an unreasonable risk of danger if paroled.

Here, the facts of the crime have been used as the real reason for denying parole on (13) separate occasions, yet, those facts have never been tied to current behaviors showing petitioner still presents an unreasonable risk of danger to the public at this time. A rule requiring the presence of in-prison, adverse behavior to justify further denials based on the crime simply recognizes what the 9th Circuit in Biggs alluded when it talked of the rehabilitative goals of the system, and, the need to take into consideration that a person can change. At this point, petitioner has been incarcerated for (23) years, eligible for parole for more than (13) of those years. His

programming clearly shows his full rehabilitation. In drawing the line as to when further denials become arbitrary, that line has definitely been crossed in this case, and, in fact, was crossed as soon as the crime was used in the second parole hearing without the presence of facts showing a continued risk of danger based on how petitioner was programming in prison. To the contrary, the in-prison facts are exclusively positive.

As the Ramirez court noted, the paroling authority must do more than merely commend petitioner for the hard work done to rehabilitate himself while in prison. They must actually consider these factors "as ... circumstance[s] tending to show his suitability for parole." Ramirez, supra, 94 Cal.App. 4th at 571-572 [emphasis original]. Of course, all the Board did with petitioner's extensive accomplishments was to brush them aside with several terse lines, and, issue a superficial compliments. The Biggs rule is clear that if an inmate continue[s] to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of his offense and prior conduct would raise serious questions involving his liberty interest in parole. Biggs v. Terhune, supra, 334 F.3d at 916. Here, the evidence of actual rehabilitation is beyond dispute.

In comparing the present case with Biggs, it is undeniably clear that the Board lacks any justification whatsoever to continue to deny petitioner a parole date. In Biggs, the inmate was convicted of the premeditated and deliberate 1st Degree Murder of a witness in a major theft case against the defendants, and, yet, the court was quick to caution the Board that it could not continue to solely rely on the commitment offense to deny the inmate parole, even though it was only

his initial hearing at that point. Yet, petitioner has been denied parole on (13) separate occasions, each time effectively relying virtually exclusively upon the unchanging facts of his commitment offense. The continued reliance upon the commitment offense is simply arbitrary, particularly in the face of the Boards' acknowledgements of petitioner's model behavior in prison and extensive accomplishments, all of which are conceded by the statement of decision. Therefore, as the court stated in Biggs, denying him a parole date simply because of the nature of the offense, not only raises serious questions involving his liberty interests in parole, but, flatly violates due process. (see Biggs v. Terhune, supra, 334 F.3d at 915-916; Irons, supra.).

B. JUDICIAL OVERSIGHT IS CRITICAL TO SAFEGUARD THE UNDERLYING PURPOSE OF CALIFORNIA'S PAROLE SYSTEM AND THE LIBERTY INTEREST'S OF INMATES.

THE ESSENCE OF THE PAROLE SYSTEM IS THE RE-ENTRY OF PRISONERS WHO NO LONGER POSE A PUBLIC DANGER.

Parole, the release of the imprisoned before they have served the maximum time set by their sentences, has long been part of the California penal system. The Indeterminate Sentencing Law, requiring the trial judge to set a minimum but not a mixiumum sentence was enacted in 1917. In re Minnis, (1972) 7 Cal.3d 639, 643 n.2 ("the court in imposing the sentence shall not fix the term or duration of the period of imprisonment")(citation and internal quatation omitted). The goal of indeterminate sentences and the California parole system is not only to punish, but, also to provide for reformation and rehabilitation:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits

> of a particular offender ... retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

People v. Morse, (1964) 60 Cal.2d 631, 643 n.8 (quoting Williams v. State of New York, (1949) 337 U.S. 241, 247). In a lengthy discussion of this topic, the California Supreme Court stated as follows:

> [T]he purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. The endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing.
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> [...]
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> [The] interests of society require that under prison discipline every effort should be made to produce a reformation of the prisoner ... The Legislative policy [was to provide a system whereby] a hope was to be held out to prisoners that through good conduct in prison and a disposition shown toward reformation, they might be permitted a conditional liberty upon restraint under which they might be restored again to society...
>
> [...]
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> Although good conduct while incarcerated and potential for reform are not the only relevant factors, the court has acknowledged their significance. Furthermore, the authority has declared that these factors are among those of "paramount importance."

In re Minnis, Cal.3d at 644-45. The Rosenkrantz court, citing Minnis, reaffirmed the principles. "[E]ven before factors relevant to parole decisions had been set forth expressly by statue and by regulations,

we concluded that [a]ny official or Board vested with discretion, is under obligation to consider all relevant factors [citations], and, the [official or Board] cannot, consistently with its obligation, ignore post conviction factors unless directed to do so by Legislature." In re Rosenkrantz, (2002)29 Cal. 4th 616, 656 (quoting Minnis, 7 Cal.3d at 645).

C. PRISONERS HAVE A CONSTITUTIONAL LIBERTY INTEREST IN PAROLE DECISIONS.

"[P]arole applicants in this California have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." Rosenkrantz, 29 Cal. 4th at 659-61 (holding that the California Constitution (Art. V, Section 8(b) and Cal. Penal Code §3041 "give rise to a protected liberty interest" in that, "a prisoner granted parole by the Board has an expectation that the Governor's decision to affirm, modify, or reverse the Board's determination will be based upon the same factors, the Board is required to consider," and, that "this liberty interest underlying a Governor's parole review decisions is protected by due process law.")

Federal courts have also unequivically held that California's parole system gives rise to a liberty interest constitutionally protected by due process. (see Board of Pardons v. Allen, (1987) 482 U.S. 369, 376-78, Greenholtz v. Inmates of Neb. Penal & Correctional Complex, (1979) 442 U.S. 1, 11-12 (holding a state's statutory parole scheme that uses mandatory language may create a presumption that parole release will be granted upon certain circumstances or findings, thus, giving rise to a constitutionally protected liberty interest); McQuillion v. Duncan, (9th Cir. 2002) 306 F.3d 896, 902-03

n.1, 903 (holding that because California's parole scheme uses mandatory language and is largely parallel to the schemes found in Allen and Greenholtz, to give rise to a protected liberty interest in release on parole, "California's parole scheme gives rise to a cognizable liberty interest in release on parole.") Biggs v. Terhune, (9th Cir. 2003) 334 F.3d 910, 915-916.

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PRAYER FOR RELIEF

Petitioner is without remedy save for Habeas Corpus. Accordingly, petitioner requests that the court:

1. Issue a Writ of Habeas Corpus granting petitioner's Due Process claim that there was not sufficient evidence to the decision finding him unsuitable for parole;
2. Issue an Order To Show Cause;
3. Declare the rights of petitioner;
4. Appoint counsel to represent petitioner;
5. Issue an Order releasing petitioner based on supporting evidence showing he has exceeded the Matrix pertaining to his commitment offense;
6. Grant any and all other relief found necessary or appropriate.

Dated March 16, , 2006.

Respectfully submitted,

Frank McCormick,
Petitioner in Pro Se

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8 Did you appeal from the conviction, sentence, or commitment? xXXx Yes. ☐ No If yes, give the following information:

a Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

N/A

b Result Denied c. Date of decision: N/A

d Case number or citation of opinion, if known. N/A

e Issues raised (1) N/A

(2)

(3)

f. Were you represented by counsel on appeal? xxx Yes. ☐ No. If yes, state the attorney's name and address, if known:

Attorney Newhouse

9. Did you seek review in the California Supreme Court? ☐ Yes. xxx No. If yes, give the following information:

a Result: b. Date of decision:

c. Case number or citation of opinion, if known:

d. Issues raised: (1)

(2)

(3)

10 If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative Review

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review

Board of Prison Terms decision to deny parole to petitioner was made on 11-14-05 and became final on 03-14-06. (see Exhibit "C", P.71;24-26). No Administrative remedy exists for claims concerning the discretionary authority of the BPT as of May 17, 2004.

b Did you seek the highest level of administrative review available? N/A Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.